

IN THE MATTER OF LICENSE NO. 365686
AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: George Joaqueine SOUZA

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1804

George Joaqueine SOUZA

This appeal is taken in accordance with 46 CFR 137.25-15 from an order of an Examiner at Long Beach, California, dated 1 October 1969, denying Appellant's petition to reopen a hearing terminated by the Examiner's decision dated 25 September 1969, served on 26 September 1969. The petition to reopen the hearing tolled the running of the 30 day period for filing appeal. 46 CFR 137.25-10(i). The petition was correctly addressed to the Examiner who heard the case because no notice of appeal from his decision had been filed. 46 CFR 137.25-1(b).

In considering this appeal from the Examiner's denial of the petition to reopen, I will consider only the issue raised by the petition. 46 CFR 137.25-15(a).

The hearing in this case was held with Appellant appearing without counsel, after proper advice as to his right to counsel. Two persons testified at the hearing, one a witness for the Investigating Officer, the other Appellant himself in his own behalf.

The petition to reopen submitted to the Examiner provided two affidavits, one from the Investigating Officer's witness, and one from Appellant himself. There is an appearance that the affidavit from the Investigating Officer's witness is in some respects different from the testimony given before the Examiner.

It is obvious that Appellant's affidavit cannot contain newly discovered evidence. What Appellant knows and can testify to now he knew and could have testified to at the time of hearing. The proffered testimony, by way of affidavit, of the witness who appeared at the hearing, is said to be "newly discovered evidence" because it was elicited only after "proper interrogation by an attorney," while Appellant was unable to elect the answers at hearing before the Examiner because he was not an attorney.

I need not consider whether the skill of an attorney eliciting at a later date a different version of events from a witness is an

appropriate consideration. Here, it is enough to find that the witness appeared before the Examiner, was subject to cross-examination, and testified.

If the rejection of Appellant's petition to the Examiner to reopen the hearing were to be reversed, it would open the way for any person who appeared before an examiner without professional counsel to move to reopen merely on the grounds that he had decided, after an adverse decision, to hire a lawyer. This option must be exercised by a person served with charges before a hearing ends. He cannot be heard to argue, after a hearing is closed, that he might have done better with a lawyer hired earlier.

There is in this case no newly discovered evidence. Everything known to and available to Appellant was available to him at the time of hearing. The super-added skill of his attorney on appeal does not enable him to convert evidence available at the hearing to "newly discovered" evidence merely because this or that attorney might have made a different use of the evidence available.

Appellant has thirty days in which to file appeal from the Examiner's decision on the merits of the case if he should so desire.

ORDER

The order of the Examiner dated at Long Beach, California, on 1 October 1969, denying Appellant's petition to reopen a hearing, is AFFIRMED.

C. R. BENDER
Admiral, U. S. Coast Guard
commandant

Signed at Washington, D. C., this 24th day of July 1970.

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